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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. .....

EVELYN LEADMAN,
Petitioner,

vs.

THE GREYHOUND CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

JURISDICTION.

The Petition for Writ of Certiorari filed herein contains a statement to the effect that "Jurisdiction is conferred on this Court to grant this Writ by 28 U. S. C. A., Sec. 1651 (3)." (Emphasis supplied, see page 2, Petition for Writ.) While we have no doubt that under the broad discretionary power that rests in this Court, it has the power to grant the Writ in question, we earnestly insist that the facts in the instant case are utterly insufficient to warrant the exercise of that power. In the first place, without being facetious, we have searched diligently and

we find no subsection (3) to 28 U. S. C. A. 1651. The Petitioner has not favored us and the Court with a quotation of the precise statutory provision or rule upon which jurisdiction supposedly rests, and in the absence of such we are not informed of the provision upon which the contention of jurisdiction is based. However, Subsection (a) of 28 U. S. C. A. 1651 appears sufficiently broad to authorize this Court to exercise that power in almost any situation presented. However, we earnestly insist that the facts in the present case are clearly insufficient to justify the issuance of the requested Writ.

STATEMENT OF THE CASE.

This lengthy litigation began with a suit by the Petitioner in the Breathitt Circuit Court of Kentucky against Southeastern Greyhound Lines and Marion Clay Hamm, one of its drivers for personal injuries sustained in a bus accident. Separate answers were filed by the driver and Southeastern Greyhound Lines. In its answer, Southeastern Greyhound Lines denied all allegations of negligence and pleaded that it and Greyhound Corporation were the same corporate entity. It stated that Southeastern Greyhound Lines was an operating division of Greyhound Corporation and not a separate corporation. A jury trial was had upon the issues of negligence and a verdict was returned in favor of the Petitioner against the Respondent only. (See page 4, Petition of Writ.) Nothing was stated in the verdict about Marion Clay Hamm, the co-defendant and driver of the bus, and under a long line of unbroken decisions in this State, the failure of a jury to find either for or against a defendant is a finding in his favor. Acting upon the basis of these decisions, an appeal was taken to the Court of Appeals of Kentucky, where the case was reversed and remanded to the Breathitt Circuit Court with directions to enter a judgment for the Respondent. (See the opinion attached to the Petition for Writ.) Following

this, the Petitioner filed a Petition for Rehearing with the Court of Appeals wherein she asserted for the first time that the decision, as rendered, deprived her of property without due process of law in violation of her rights under the 14th Amendment to the U. S. Constitution. The Court of Appeals peremptorily cast this assertion aside but graciously did what it could to preserve the question for the Petitioner by inserting a short paragraph in which it gave recognition to the contention but stated that it was entirely without merit.

Thereafter, mandate issued from the Court of Appeals to the Breathitt Circuit Court and in accordance with it, judgment was entered and the trial court dismissed the complaint. This petition for Writ of Certiorari followed.

Although it is phrased somewhat differently in the Petition for Writ (See page 2 of Petition), it seems to us that the question presented to this Court at this time is as follows:

> Where both master and servant are sued for negligence and the jury returns a verdict in favor of the plaintiff and against the master alone, and the verdict is set aside because the rule under State Law is that such a verdict cannot stand since it is a finding in favor of the servant and a master is not liable for the alleged negligence of his servant unless the servant is also liable, does the application of such a substantive rule of law operate to deprive one of property without due process of law in violation of the 14th Amendment to the U. S. Constitution and consequently justify this Court in granting a Writ of Certiorari?

The phraseology of this question in the Petition for Writ is obviously designed to procure the sympathy of the Court for a disappointed litigant. The authorities touching upon this point will now be considered.

ARGUMENT.

A Writ of Certiorari Will Not Issue From This Court to Change or Modify Rulings of State Courts Upon Substantive Questions of Law.

The ruling of the Court of Appeals of Kentucky is based upon an ancient but firmly established rule of substantive law. That rule of law is expressed in the simple and well known maxim of respondeat superior. Where liability of the master is attempted to be predicated upon the negligence of a servant, that master is not liable under the doctrine of respondeat superior unless the servant is also found to be liable. That rule is almost as ancient as the history of our system of jurisprudence itself. However, whether the rule as applied by our court is in accord with the weight of authority on the point or not, whether it is correct or incorrect, certiorari will not issue from this Court to change or modify the ruling of a State Court upon a substantive rule of law. This rule is also of a rather ancient origin and we are unable to find where this Court has ever made a single departure from it. A case almost identical in principle with the case at bar is Allen v. Caterpillar Tractor Company, 96 F. 2d 937. That case involved a suit by the plaintiff against his employer for the recovery of damages suffered by him from injuries received through the inhalation of silica dust. It appeared from the complaint that in numerous cases the Supreme Court of Illinois had held that an employee could not recover damages from his employer under the factual situation presented. In his complaint the plaintiff alleged that these decisions of the Illinois Court were in violation of the due process clause of the 14th Amendment to the U. S. Constitution. Thus, it appears that the contention in that case is almost identical with that in the case at bar. In the foregoing case, this contention was summarily brushed aside by the Court for the following reason:

"Nor can we accept plaintiff's urge that the Illinois Supreme Court in so holding violated the due process clause of the Fourteenth Amendment of the United States Constitution. A contrary holding by the Supreme Court has settled this question. Patterson v. Colorado, 205 U. S. 454, 27 S. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689."

When the contention of the Petitioner in the case at bar is reduced to its simplest form, it is obvious that she desires nothing more than a review of the ruling of the Court of Appeals of Kentucky. This Court has declined such an invitation on numerous occasions. In the case of Central Land Company v. Laidley, 159 U. S. 103, 16 S. Ct. 80, this principle was stated very succinctly as follows:

"The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary."

The foregoing rule was stated for the Court by Mr. Justice Harlan in Tracy v. Ginzberg, 205 U. S. 170, 27 S. Ct. 461, in the following language:

"The plaintiff also insists that by the judgment of the supreme judicial court of Massachusetts he has been deprived of his property without the due process of law guaranteed by the 14th Amendment of the Constitution of the United States. This proposition is without merit. Within the meaning of that Amendment, the court, by its judgment, did not deprive the plaintiff of property without due process of law. He sought a decree adjudging that he was entitled to the money received by Ginzberg from O'Hearn. **The Court, proceeding entirely upon principles of general and local law, and giving all parties interested in the question an opportunity to be heard, decided that plaintiff had no right to that money. The decision of a state court, involving nothing more than the ownership of prop-**

erty, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property. If we were of opinion, upon this record, that the money received by Ginzberg from O'Hearn really belonged to Tracy—still it could not be affirmed that the latter had, within the meaning of the Constitution, and by reason of the judgment below, been deprived of his property without due process of law. **Under the opposite view every judgment of a state court involving merely the ownership of property could be brought here for review—a result not to be thought of. The 14th Amendment did not impair the authority of the states, by their judicial tribunal, and according to their settled usages and established modes of procedure, to determine finally, for the parties before them, controverted questions as to the ownership of property, which did not involve any right secured by the Federal Constitution or by any valid act of Congress, or by any treaty. Within the meaning of that Amendment, a deprivation of property without due process of law occurs when it results from the arbitrary exercise of power, inconsistent with 'those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.'** Den ex dem. Murray v. Hoboken Land & Improv. Co., 18 How. 272, 15 L. ed. 372; Bank of Columbia v. Okely, 4 Wheat. 235, 244, 4 L. ed. 559, 561. It cannot be said that the state court in this case, by its final judgment, departed from those usages or modes of proceeding."

In the case of Patterson v. Colorado et al., 205 U. S. 454, 27 S. Ct. 556, this court stated the principle in question in the following manner:

"But, in general, the decision of a Court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the 14th Amendment merely because it is wrong or because earlier decisions are reversed."

In the present case the Petitioner selected the forum and the predicament that she now finds herself in was the result of her failure to take advantage of remedies which were provided under our law for the situation created by the verdict. This is indicated by the opinion of our Court of Appeals wherein it states as follows:

"Remedies for the situation created by the verdict were available to the appellee, but she did not utilize them."

To the effect that this litigation has now run its course and that the Petitioner has exhausted all possible avenues for relief from her situation, we quote as follows from Thompson v. Kentucky, 209 U. S. 340, 28 S. Ct. 533:

"At any rate, it is the province of the courts to interpret the laws of the state, and he who acts under them must take his chance of being in accord with the final decision. And this is a hazard under every law, and from which or the consequences of which we know of no security."

The plight of the Petitioner is well illustrated by the following language of this Court in Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 29 S. Ct. 220:

"In this case the defendant has had a trial in a court of justice duly established under the laws of the state; the question of its liability has been submitted to a jury. The judgment has been reviewed in an appellate court, and the correctness of the findings of fact and rulings of law in the lower court affirmed.

We are not prepared to say that there was a deprivation of due process of law."

The "due process" clause of the 14th Amendment was never intended to permit every litigant who was disappointed and dissatisfied with a decision of his highest state Court upon a substantive point of law to perfect an appeal to this Court. This Court is not and was never intended to serve as a watchdog over the highest courts of each of the forty-eight states of this country. The old cliche may be trite but it still appears appropriate at this time—there must be and is a finality to all litigation.

The foregoing principles are very clearly set forth by Mr. Justice VanDevanter in Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U. S. 157, 37 S. Ct. 318, in the following language:

> **"The claim that the court, in disposing of some of the questions, including that of the estoppel, misconceived or misapplied the statutory and common law of the state, and thereby infringed the due process and equal protection clauses of the 14th Amendment, requires but brief notice. The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law.** Sayward v. Denny, 158 U. S. 180, 186, 39 L. ed. 941, 943, 15 Sup. Ct. Rep. 777; Central Land Co. v. Laidley, 159 U. S. 103, 112, 40 L. ed. 91, 94, 16 Sup. Ct. Rep. 80; Castillo v. McConnico, 168 U. S. 674, 683, 684, 42 L. ed. 622, 625, 626, 18 Sup. Ct. Rep. 229. **The questions presented, other than those relating to the validity of the state Board's adjudication, all turned exclusively upon the law of the state, and the state court's decision of them is controlling.** Preston v. Chicago, 226 U. S. 447, 57 L. ed. 293, 33 Sup. Ct. Rep. 177; St. Louis & K. C. Land Co. v. Kansas City, 241

U. S. 419, 427, 60 L. ed. 1072, 1077, 36 Sup. Ct. Rep. 647; Old Colony Trust Co. v. Omaha, 230 U. S. 100, 116, 57 L. ed. 1410, 1416, 33 Sup. Ct. Rep. 967."

This court is, of course, aware of the magnitude of the additional burden that would be thrust upon it by the granting of a Writ of Certiorari in a case such as the one at hand. Recognition of the deluge of Petitions for Writs that would fall upon this Court if it should stray or depart from its established practice has often been made. Some of the cases referred to previously herein contain statements to this effect. This Court in the very recent case of Gryger v. Burke, 334 U. S. 728, 68 Sup. Ct. 1256, speaking through Mr. Justice Jackson made the following very appropriate comment:

> **"Nothing in the record impeaches the fairness and temperateness with which the trial Judge approached his task. His action has been affirmed by the highest court of the commonwealth. We are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question."**

The "due process" clause of the 14th Amendment was never intended to insure immunity from error or to provide uniformity of decision on all questions of substantive law in each of the forty-eight states. To this effect we quote as follows from Riley v. Worcester County Trust Co., 89 F. 2d 59:

> "It has been settled that that amendment does not assure immunity from judicial error or uniformity of judicial decisions."

To the same effect are the cases of Milwaukee Electric Railway and Light Company v. Wisconsin, 252 U. S. 100, 40 S. Ct. 306; McCauhey v. Lyall, 224 U. S. 558, 32 S. Ct. 602; Bristow Battery Co. v. Board of Commissioners of Rogers County, 37 Fed. 2d 504, and the very recent case of Biggs v. Ward, 212 F. 2d 209.

The citation of cases in support of the foregoing principles might be multiplied many times. However, the point in controversy appears so well settled that further reference to the authorities would be superfluous.

We do not wish to be misunderstood in our contention. We do not admit that the decision of our Court of Appeals is erroneous. To the contrary it was in accord with a long and well established rule of law in this jurisdiction (Louisville & N. R. Co. v. Farney, 295 Ky. 8, 172 S. W. 2d 656; C. & O. Railway Co. v. Williams, 300 Ky. 850, 190 S. W. 2d 549; Dillon v. Harkleroad, 295 Ky. 308, 173 S. W. 2d 419; Illinois Central R. Co. v. Applegate's Adm'x., 268 Ky. 458, 105 S. W. 2d 153, and Lewis v. Devasher [Ky.], 267 S. W. 2d 938). This formidable list of the authorities in this state is by no means exhaustive but it does serve to prove that the present plight of the Petitioner cannot be laid to any surprise decision of our Court. Either the Petitioner failed to apprise herself of the existence of such a rule or else she, with full knowledge of the existence of the rule, failed to take advantage of remedies that were once available to her. In either event this Court is not a panacea for lethargy and all other ills that may cause a disappointed litigant to overlook legal remedies that are available to him.

Insofar as we are advised, no valid reason has ever been assigned by the Petitioner as to just how or wherein the decision of our Court of Appeals has violated the "due process" clause of the 14th Amendment. In times past, the Petitioner has repeatedly referred to the rule of law

which was applied by our Court of Appeals as a "technicality". This offers no solution whatever to the ultimate question at hand. Doubtlessly, every losing litigant feels that the particular rule of law which contributed to or caused his defeat was a harsh and unjust "technicality". In the petition for the Writ, attention is called to the fact that the Greyhound Corporation might have been sued alone and that it was unnecessary to sue the driver. This may be quite true, but this Respondent is not responsible in the least for the fact that the driver was in fact sued. The Petitioner and her attorneys had the sole right to select their adversaries and they and they alone elected to join the driver as a party defendant. Having voluntarily done so, we are unable to see that the Petitioner has any cause for complaint.

Next, the Petitioner states that the jury would not have found against the Respondent unless it had believed that the driver was negligent. This is nothing but bald surmise and speculation. The jury did not return a verdict against the driver and it might have well have been due to the fact that it felt that the driver was not negligent. The Respondent could only act through its driver and therefore, it certainly should not be held liable if its driver was not also found to have been negligent. The verdict for the Petitioner against the Respondent alone may have well have been motivated by sympathy for the Petitioner. Such is certainly not unknown in the annals of jurisprudence. At any rate, the evidence is not now before the court. Any reference thereto or speculation thereon is outside the scope of the present inquiry. The principle governing the question at hand appears to us to be so well established that further elaboration is unnecessary.

The Petitioner also seems to make some complaint of the instructions given by the trial court at this late stage. It is intimated that the instructions are responsible for the failure of the jury to find against the respondent's driver.

She states that the jury was told that it might find for the plaintiff against either of the defendants and that it might also find a verdict against one defendant and in favor of the other. At no time has the Petitioner made any complaint of the instructions given by the trial court. Moreover, when the instructions were given, the Petitioner, through her attorneys, announced that she had no objections to the instructions. Certainly, this conduct constituted a waiver of any right that the Petitioner may have ever had to complain of the instructions. Aside from that, the objection now sought to be made comes entirely too late.

For each of the foregoing reasons, we earnestly submit that the Petitioner has not been deprived of her property without due process of law within the meaning of the 14th Amendment. Accordingly, the Petition for Writ of Certiorari should be denied.

CONCLUSION.

Rarely if ever does a court have an opportunity to render a decision to the complete satisfaction of everyone concerned. This case is no exception. The Petitioner chose the original forum of this litigation and she and her attorneys freely elected to sue the driver of the bus. She was accorded a fair trial before a jury in the county of her selection and when the jury returned the verdict which led to her eventual downfall she could, if seasonable request had been made, have required the court to request the jury to find either for or against the driver. Instead she remained silent. Thereafter, an appeal was taken to the highest appellate court in Kentucky and the decision now under attack was rendered. Truly, the Petitioner has been accorded not only "due process", but every process of law. Laggardness has served to deprive her of a remedy but the law and our Courts have afforded her every process known to any law.

The granting of the requested Writ would be akin to lifting the lid from the proverbial "Pandora's Box". If the requested Writ should issue no one is more aware of the disastrous consequences that would follow than are the members of this Court. The "Procrustean Bed" in which the Petitioner now lies was hewn and molded by the Petitioner and her attorneys and although it may appear somewhat hard and knotty to them, they should be compelled to lie in it. No amount of sympathetic pleading and pressure should be permitted to sway this Court from its long established principle. Clearly, "due process" in every sense has been given the Petitioner. The application for the Writ should be promptly denied.

Respectfully submitted,

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